A

DATO' SERI ANWAR IBRAHIM

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
AZIAH ALI JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPEAL NO: W-05-19-01-2012]

C

14 APRIL 2014

CRIMINAL PROCEDURE: *Prosecution - Appeal - Prosecution of appeal conducted by advocate appointed as Deputy Public Prosecutor - Application for disqualification - Advocate previously breached Legal*

D

Profession Act 1976 s. 94(3)(k), Legal Profession (Practice and Etiquette) Rules 1978 rr. 3(a), 4 and 5 and Legal Profession (Publicity) Rules 2001 - Principles applicable for disqualification - Whether Deputy Public Prosecutor should be disqualified

E

LEGAL PROFESSION: *Duty to court - Conflict of interest - Advocate previously breached Legal Profession Act 1976, Legal Profession (Practice and Etiquette) Rules 1978 and Profession (Publicity) Rules 2001 - Advocate appointed as Deputy Public Prosecutor - Advocate defended same witness who was found unreliable in previous case - Whether there*

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was conflict of interest - Whether advocate should be disqualified as Deputy Public Prosecutor

The applicant sought to disqualify Tan Sri Muhammad Shafee bin Md Abdullah ('Shafee') *vide* notice of motion in encl. 73a as a Deputy Public Prosecutor in an appeal against the applicant's

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acquittal. The affidavit of support ('encl. 73b') for the application mounted that the appointment of Shafee made under ss. 376(3), 379 Criminal Procedure Code ('CPC') and art. 145(3) of the Federal Constitution was null and void. The reason relied in support of the motion were namely: (i) that Shafee had breached

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the Legal Profession (Publicity) Rules 2001 and was fined RM5,000; and (ii) that Shafee had breached s. 94(3)(k) of the Legal Profession Act 1976 ('Act 116') and rr. 3(a), 4 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978 which arose from a conflict of interest where Shafee had found a witness

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to be unreliable in a Suhakam Inquiry and now it was untenable

for Shafee to appear in the present court and defend the credibility of the same witness who was the star witness of the prosecution in the court below. Thus, the applicant averred that Shafee would not be able to conduct the appeal fairly, objectively and independently. The applicant submitted that since Shafee was found guilty of misconduct under Act 116, which made him liable to be struck off the Rolls under s. 94(2) of the same Act, he was not a fit and proper person to be appointed as a DPP. The applicant therefore urged the court to exercise its inherent jurisdiction to disqualify Shafee from prosecuting the appeal. The applicant further submitted that since there was no affidavit in reply to the supporting affidavit, the contents thereof must be deemed to be accepted. In response to the applicant's contention, Shafee argued that the applicant's affidavit in support contained facts and opinion and since Shafee was not challenging the facts, there was no necessity for him to rebut the same. In the submissions in reply, Shafee, raised the issue of *estoppel* and *res judicata* and contended that the applicant's application was frivolous and vexatious.

Held (dismissing application in encl. 73a with no order as to costs)

Per Balia Yusof Wahi JCA delivering the judgment of the court:

(1) The court should hesitate to order disqualification except where necessary and for good reason. A disqualification may be ordered only if the court determines that a lawyer's continued participation as counsel tainted the judicial system. Since Shafee was not challenging the facts as averred in encl. 73b, the absence of any affidavit in reply was of no consequence to the present motion. Where there is nothing to rebut, no affidavit of denial was necessary. (paras 8 & 10)

(2) The misconduct attributed to Shafee must be of such a nature that the Disciplinary Board thought fit to warrant him to be struck off the Rolls. The court could not make a finding of unfitness to practice independent of the Bar Council. Such powers are statutorily vested in the Bar Council. The Bar Council must have deemed that, being fined by the Bar Council Disciplinary Board, Dato' Seri Shafee had not been convicted of a criminal offence and not unfit to be a member

of his profession. The prosecutorial discretion to regulate the conduct of prosecution was the constitutional prerogative of the Public Prosecutor. The appointment of Shafee was at the sole discretion of the Public Prosecutor and no other body including the Bar Council could usurp that prerogative vested on the Public Prosecutor. (paras 13-15)

(3) The Suhakam Inquiry and the trial are two separate and unrelated proceedings. Even if SP25 was found to be not telling the truth in the Suhakam Inquiry, it did not necessarily follow that he will not be a truthful witness in the trial. The fact that Shafee may not have a high regard for SP25 in the Suhakam Inquiry and that in this appeal he would be defending SP5's evidence does not give rise to a situation where he could be said to be having two irreconcilable duties. Therefore Shafee's objectivity and independence was not compromised. (paras 16 & 18)

(4) The applicant was barred from raising the issue of conflict of interest as the applicant had ample opportunity to raise this ground in the earlier motions to disqualify him, instead of raising them by way of instalments. As regard to the issue of frivolous and vexatious litigation, there was force in the submissions by Shafee that this motion was made for the purposes of delaying the prosecution of the main appeal. It was therefore a vexatious application and an abuse of process. Thus, the motion has no merit and should be dismissed *in limine*. (paras 20, 25 & 33)

Bahasa Malaysia *Translation Of Headnotes*

Pemohon telah membuat permohonan untuk membatalkan Tan Sri Muhammad Shafee bin Md Abdullah ('Shafee') melalui notis usul dalam lampiran 73a daripada bertindak sebagai Timbalan Pendakwa Raya dalam rayuan terhadap perintah pelepasan dan pembebasan pemohon. Afidavit sokongan ('lampiran 73b') permohonan tersebut menyatakan bahawa pelantikan Dato' Seri Shafee yang dibuat di bawah ss. 376(3), 379 Kanun Tatacara Jenayah ('KTJ') dan per. 145(3) Perlembagaan Persekutuan adalah tidak sah dan terbatal. Alasan-alasan yang disandarkan untuk menyokong notis usul tersebut adalah: (i) bahawa Shafee didapati melanggar Kaedah-Kaedah Profesion Undang-Undang (Publisiti) 2001 dan

telah didenda sejumlah RM5,000; dan (ii) bahawa Shafee telah melanggar s. 94(3)(k) Akta Profesion Undang-Undang 1976 ('Akta 116') dan kk. 3(a), 4 dan 5 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etiket) 1978 yang timbul daripada konflik kepentingan di mana Shafee telah mendapati seorang saksi ('SP25') tidak boleh dipercayai dalam siasatan Suhakam, dan kini tidak boleh diterima bagi Shafee di mahkamah ini mempertahankan kredibiliti saksi sama yang merupakan saksi utama bagi pihak pendakwaan di mahkamah bawahan. Justeru, pemohon menegaskan bahawa Shafee tidak boleh mengendalikan rayuan ini secara adil, objektif dan bebas. Pemohon menghujahkan bahawa oleh kerana Shafee didapati bersalah atas salah laku di bawah Akta 116, yang boleh menyebabkan nama beliau dibatalkan daripada senarai peguambela dan peguamcara di bawah s. 94(2) Akta yang sama, Shafee bukanlah seorang yang layak dan sesuai untuk dilantik sebagai Timbalan Pendakwa Raya. Oleh itu, pemohon menggesa mahkamah melaksanakan bidang kuasa sedia ada untuk menghalang Shafee daripada mendakwa rayuan tersebut. Pemohon menghujahkan bahawa oleh sebab tiada sebarang afidavit untuk menjawab lampiran 73b, kandungan lampiran 73b hendaklah disifatkan sebagai diterima. Sebagai jawapan kepada hujahan pemohon, Shafee menegaskan bahawa lampiran 73b mengandungi fakta-fakta dan pendapat, dan oleh sebab Shafee tidak mencabar sebarang fakta, tiada keperluan untuk beliau mematahkannya. Dalam hujahan balasan, Dato' Seri Shafee membangkitkan isu *estoppel* dan *res judicata* dan menghujahkan bahawa permohonan pemohon adalah remeh dan menyusahkan.

Diputuskan (menolak permohonan lampiran 73a tanpa perintah untuk kos)

Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah hendaklah mempertimbangkan pemberian perintah pembatalan kecuali jika perlu dan atas alasan yang munasabah. Perintah pembatalan hanya boleh diperintahkan jika mahkamah memutuskan bahawa penyertaan peguam tersebut akan mencemarkan sistem kehakiman. Oleh kerana, Shafee tidak mencabar fakta seperti yang dinyatakan dalam lampiran 73b pemohon, ketiadaan afidavit jawapan adalah tidak penting kepada usul ini. Jika tiada apa-apa untuk dibantah, maka afidavit penafian adalah tidak perlu.

(2) Salah laku yang dikaitkan dengan Shafee perlu mempunyai sifat di mana ia adalah wajar bagi Lembaga Tatatertib membatalkan Shafee daripada senarai peguambela dan peguamcara. Mahkamah tidak boleh membuat dapatan ketidaklayakan untuk beramal bebas daripada Majlis Peguam. Kuasa sedemikian adalah terletak hak secara statutori pada Majlis Peguam. Majlis Peguam sepatutnya menganggap bahawa, dengan dikenakan denda oleh Lembaga Disiplin Majlis Peguam, Shafee tidak disabitkan atas suatu kesalahan jenayah dan adalah layak untuk menjadi ahli profesionnya. Budi bicara pendakwaan untuk mengawal selia pelaksanaan pendakwaan adalah hak perlembagaan Pendakwa Raya. Pelantikan Shafee adalah budi bicara mutlak Pendakwa Raya dan tiada badan lain termasuk Majlis Peguam yang boleh merampas hak yang terletak kepada Pendakwa Raya.

(3) Siasatan Suhakam dan perbicaraan adalah dua prosiding yang berasingan dan tidak berkaitan. Walaupun SP25 telah didapati tidak bercakap benar dalam siasatan Suhakam, tidak semestinya SP25 tidak akan menjadi saksi yang boleh dipercayai dalam perbicaraan. Fakta bahawa Shafee tidak mempunyai pandangan tinggi terhadap SP25 dalam siasatan Suhakam dan bahawa dalam rayuan ini, beliau akan mempertahankan keterangan SP5 tidak menimbulkan situasi di mana beliau boleh dikatakan mempunyai dua tugas yang tidak boleh diselaraskan. Oleh itu objektif dan kebebasan Shafee tidak terjejas.

(4) Pemohon telah dihalang daripada membangkitkan isu konflik kepentingan kerana pemohon telah mempunyai peluang untuk mengemukakan alasan ini dalam usul-usul awal untuk menghalang penyertaan beliau, dan bukannya mengemukakan alasan ini dengan cara ansuran. Berkaitan isu litigasi remeh dan menyusahkan, terdapat keutuhan dalam hujahan Shafee bahawa usul ini telah dibuat bagi melambatkan pendakwaan rayuan utama. Oleh itu, ia adalah permohonan yang menyusahkan serta penyalahgunaan proses. Oleh itu, usul tersebut tidak mempunyai merit dan harus ditolak *in limine*.

Case(s) referred to:

Ahmadi Yahya v. PP [2012] 7 CLJ 113 CA ***(refd)***

Attorney General v. Vernazza [1960] 3 All ER 97 ***(refd)***

Cold Storage Singapore [1983] Pte Ltd v. The Management Corp of Chancery Court & Ors [1992] 1 CLJ 537; [1992] 4 CLJ (Rep) 272 CA ***(refd)***

Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor [2010] 5 CLJ 369 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2011] 7 CLJ 253 CA ***(refd)***
Harun Abdullah v. PP [2009] 4 CLJ 717 CA ***(refd)***
Hilton v. Barker Booth & Eastwood (a firm) [2005] UKHL 8 ***(refd)***
Hunter v. Chief Constable of West Midlands and another [1981] 3 All ER 727 ***(refd)***
Ishmahel Laxamana v. East India Company; Re Trebeck [1829] 1 Ky 4 ***(refd)***
Karpal Singh v. Atip Ali [1986] 2 CLJ 419; [1986] CLJ (Rep) 168 SC ***(refd)***
Khoon Chye Hin v. PP [1961] 1 LNS 41 HC ***(refd)***
Krieger v. Law Society of Alberta [2003] 3 LRC 249 ***(refd)***
Law Society of Singapore v. Tan Guat Neo Phyllis [2008] 2 SLR 239 ***(refd)***
Lee Chee & Ors v. Allen Gledhill [1990] 1 CLJ 782; [1990] 2 CLJ (Rep) 318 HC ***(refd)***
Moody v. Cox and Hatt [1917] 2 Ch 71 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***
PP v. Lee Siew Ngock [1966] 1 LNS 143 HC ***(refd)***
Ramalingam Ravinthran v. Attorney General [2012] 2 SLR 49 ***(refd)***
Sim Kooi Soon v. Malaysia Airlines System (No 2) [2010] 9 CLJ 936 CA ***(refd)***
Teoh Yook Huwah v. Menteri Hal Ehwal Dalam Negeri & Anor [1993] 1 CLJ 261 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 376(3), 379
Evidence Act 1950, s. 43
Federal Constitution, arts. 8, 145(3)
Legal Profession Act 1976, ss. 11, 94(3)(k)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 3(a), 4, 5

Constitution of the Republic of Singapore [Sing], art. 12(1)

Other source(s) referred to:
IH Jacob, *The Inherent Jurisdiction of the Court*, vol 23, p 40

For the applicant - Karpal Singh (Sangeet Kaur Deo & Zaleha Al-Hayat with him); M/s Karpal Singh & Co
For the prosecution - Muhammad Shafee Abdullah (Hanafiah Zakaria & Noorin Baharuddin with him); DPPs

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-9-2009]

Reported by Sandra Gabriel

A

JUDGMENT

Balia Yusof Wahi JCA:

Enclosure 73a

B **[1]** This is the third application by the applicant, Dato' Seri Anwar bin Ibrahim, to disqualify Tan Sri Dato' Seri Muhammad Shafee bin Abdullah ("Shafee") from leading the prosecution of the appeal No. W-05-19-01-2012 which has been pending before this court since July 2013. The previous two similar motions had C been dismissed by this court and affirmed by the Federal Court.

[2] The notice of motion at hand in encl. 73a dated 25 February 2014 is supported by the applicant's affidavit affirmed on the same date seeking for the following reliefs:

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(i) Tan Sri Dato' Seri Muhammad Shafee bin Abdullah adalah tidak layak untuk dilantik sebagai timbalan pendakwa raya oleh peguam negara bagi pihak pendakwaan di dalam Mahkamah Rayuan (Bidangkuasa Jenayah) Rayuan Jenayah No. W-05-19-01-2012 dan oleh itu lantikan beliau adalah tidak sah dan tidak E berkesan;

(ii) apa jua perintah lain yang difikirkan patut dan adil oleh mahkamah yang mulia ini.

F **[3]** The brief reasons relied upon by the applicant in support of the motion are as follows:

(i) Perlantikan Tan Sri Dato' Seri Muhammad Shafee bin Abdullah di bawah ss. 376(3) dan 379 Kanun Acara Jenayah dan art. 145(3) Perlembagaan Persekutuan untuk bertindak G sebagai timbalan pendakwa raya bagi pihak pendakwaan di dalam rayuan tersebut adalah batal, tidak sah dan tidak berkesan memandangkan Dato' Seri Muhammad Shafee bin Abdullah tidak merupakan seorang yang layak untuk dilantik memandangkan beliau telahpun didapati bersalah melanggar H Legal Profession (Publicity) Rules 2001 dan beliau telah dikenakan hukuman denda oleh Jawatankuasa Tatatertib Majlis Peguam pada 5 Oktober 2012. Keputusan tersebut telah dikekalkan apabila Guaman No. 17-59-11-2012 oleh Tan Sri I Dato' Seri Muhammad Shafee bin Abdullah terhadap keputusan tersebut ke Mahkamah Tinggi Kuala Lumpur telah ditolak tanpa perintah terhadap kos oleh Yang Arif Datuk Zaleha Yusof pada 10 Januari 2014;

(ii) Perlantikan Tan Sri Dato' Seri Muhammad Shafee bin Abdullah adalah batal dan tidak sah kerana boleh melanggar s. 94(3)(k) Legal Profession Act 1976 (Act 166) dan per. 3(a), 4 dan 5 Legal Profession (Practice and Etiquette) Rules 1978 kerana terdapat 'conflict of interest' memandangkan Tan Sri Dato' Seri Muhammad Shafee bin Abdullah telah sendiri mendapati saksi yang tidak boleh dipercayai (untruthful witness) semasa pendengaran inquiry oleh Suhakam dalam 'Suhakam Public Inquiry into the Arrest and Detention of Five Lawyers of the Kuala Lumpur Legal Aid Centre on 7 May 2009' dan Tan Sri Dato' Seri Muhammad Shafee bin Abdullah kini perlu menyokong keterangan saksi tersebut semasa pendengaran rayuan Pendakwa Raya di dalam Mahkamah Rayuan (Bidangkuasa Jenayah) Rayuan Jenayah No. W-05-19-01-2012.

[4] In the applicant's affidavit in support (encl. 73b) the applicant averred that on 5 October 2012 Shafee was fined RM5,000 by the Jawatankuasa Tatatertib Majlis Peguam ("jawatankuasa") after having breached the Legal Profession (Publicity) Rules 2001. Shafee had appealed against the decision of the jawatankuasa to the Kuala Lumpur High Court *vide* Guaman Sivil No. 17-59-11-2012 and his appeal was dismissed by the learned High Court Judge, Zaleha binti Yusof on 10 January 2014. The decision of the jawatankuasa was therefore affirmed. The applicant further averred that the Public Prosecutor ("PP") has a duty to ensure that only persons of the highest integrity and reputation ought to be appointed. Shafee's reputation has been smeared. As such, the applicant contended that Shafee is not a fit and proper person to be appointed as a Deputy Public Prosecutor ("DPP") to prosecute this appeal. It is further contended that the PP ought to have known about Shafee's status when he was appointed as a DPP since the decision of the jawatankuasa was made on 5 October 2010 and the PP is privy or at least had knowledge of the same. In his affidavit in support, the applicant avers that he only knew about the disciplinary action against Shafee only recently ie, after the decision of the High Court on 10 January 2014. Further, the applicant avers that the appointment of Shafee is not in the public interest because he will be paid from public funds.

[5] The applicant contends that Shafee's appointment is null and void for the following reasons:

(i) breach of s. 94(3)(k) of the Legal Profession Act 1976 ("Act 166"); and

(ii) breach of rr. 3(a), 4 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978.

[6] A breach of the aforesaid rules arises from a conflict of interest having regard to the fact that Shafee had found Jude Pereira ("SP25") to be an untruthful witness during the 'Suhakam Public Inquiry Into The Arrest And Detention of Five Lawyers Of the Kuala Lumpur Legal Aid Centre' on 7 May 2009. It is contended that it is now untenable for Shafee to stand before this court and defend the credibility of SP25 in this appeal who, according to the applicant, was the 'star witness' of the prosecution in the trial in the court below.

[7] It is further contended by the applicant that Shafee would not be able to conduct the appeal fairly, objectively and independently.

[8] In dealing with an application of this nature, we wish to reiterate what this court had stated in an earlier application filed by the applicant herein on the approach to be adopted in an application to disqualify counsel. Therein, this court has stated that an application to disqualify a counsel ought not to be considered in light of the principle that courts should not lightly interrupt the relationship between a lawyer and a client. The court should hesitate to order disqualification except where necessary and for good reason. A disqualification may be ordered only if the court determines that a lawyer's continued participation as counsel taints the judicial system.

[9] Before us, learned counsel for the applicant, Encik Karpal Singh merely reiterates and regurgitates without more, the averments of the applicant as contained in his affidavit in support.

[10] At the outset, learned counsel for the applicant submits that since there has been no affidavit in reply to the applicant's supporting affidavit, the contents thereof must be deemed to be accepted citing *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 MLJ 281 and *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor* [2010] 5 CLJ 369;

[2010] 3 MLJ 174 in support thereof. In reply, Shafee submits that the applicant's affidavit in support contains facts and opinion to which he need not reply. Since Shafee is not challenging the facts, therefore, there was no necessity for him to rebut the same. Insofar as the opinion contained in the affidavit, it is submitted that it is for this court to determine and not the applicant. Reliance was placed on the cases of *Cold Storage Singapore* [1983] *Pte Ltd v. The Management Corp of Chancery Court & Ors* [1992] 1 CLJ 537; [1992] 4 CLJ (Rep) 272; [1992] 1 SLR 521 and *Teoh Yook Huwah v. Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 1 CLJ 261; [1993] 1 MLJ 12. The rationale to be distilled from the authorities cited is that where there is nothing to rebut, no affidavit of denial is necessary. Therefore, the absence of any affidavit in reply from Shafee, who has categorically stated that he is not challenging the facts as averred in the applicant's affidavit in support is of no consequence to the present motion.

[11] Much was said by Mr Karpal Singh about Shafee being fined RM5,000 for breach of the Legal Profession (Publicity) Rules 2001 and that his appeal to the High Court was dismissed.

[12] Learned counsel for the applicant submits that since Shafee has been found guilty of misconduct under s. 94(3)(k) of the Act 166, which makes him liable to be struck off the rolls under s. 94(2) of the same Act, therefore Shafee is not a fit and proper person to be appointed as a DPP. Learned counsel strongly urged upon the court to exercise its inherent jurisdiction to disqualify Shafee from prosecuting the appeal (see *Ishmahel Laxamana v. East India Company; Re Trebeck* [1829] 1 Ky 4; *Karpal Singh v. Atip Ali* [1986] 2 CLJ 419; [1986] CLJ (Rep) 168; [1987] 1 MLJ 291).

[13] With respect, we find the submissions misconceived. We agree with Shafee that the misconduct attributed to him must be of such a nature that the disciplinary board thought fit to warrant Shafee to be struck off the rolls. Based on the evidence on record, we cannot discern that drastic action in the form of striking off the rolls had been taken against Shafee. We agree with Shafee that the court cannot make a finding of unfitness to practice independent of the Bar Council. Such powers are statutorily vested in the Bar Council (see *Lee Chee & Ors v. Allen Gledhill* [1990] 1 CLJ 782; [1990] 2 CLJ (Rep) 318; [1990] 2 MLJ 93 and s. 11 of the Act 166).

[14] We agree with the respondent's submission that if indeed Shafee is no longer a fit and proper person to be on the roll, surely he would have been disbarred by now. Section 11 of the Act 166 spells out the meaning of a fit and proper person qualified to be on the roll as an advocate and solicitor. The Bar Council must have deemed that, being fined by the Bar Council Disciplinary Board, Shafee has not been convicted of a criminal offence and not unfit to be a member of his profession.

[15] It is pertinent to note that the prosecutorial discretion to regulate the conduct of prosecution is the constitutional prerogative of the PP (see art. 145(3) of the Federal Constitution). In *Krieger v. Law Society of Alberta* [2003] 3 LRC 249, it was held that the Law Society can only review the professional conduct of the said deputy in his capacity as a lawyer of the Law Society of Alberta. However, they cannot review or effect the prosecutorial discretion as the said power is the constitutional prerogative of the PP. Likewise, the appointment of Shafee is at the sole discretion of the PP and no other body including the Bar Council can usurp that prerogative vested in the PP.

[16] On the issue of conflict of interest, learned counsel for the applicant vehemently argued that it is untenable for Shafee to stand before this court to defend the credibility of SP25 after having made a finding in the Suhakam Inquiry that SP25 "either consciously were not telling the truth or suffered from a serious bout of loss of memory". With respect, we wish to refer to our judgment in respect of the applicant's motion for leave to recall SP25 (encl. 62a) which we had dismissed on the ground that the finding of the Suhakam Inquiry bears no relevance to this appeal (s. 43 of the Evidence Act 1950). Even if SP25 was found to be not telling the truth in the Suhakam Inquiry, it does not necessarily follow that likewise, he will not be a truthful witness in the trial. It is trite that if a witness demonstrably tells lies on one or two points, then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. However, to say that because a witness has been proven to be a liar on one or two points then the whole of his evidence "must in law be rejected" is to go too far and is wrong (see *Khoon Chye Hin v. Public Prosecutor* [1961] 1 LNS 41; [1961] 1 MLJ 105b). It must be noted that the Suhakam Inquiry and the trial are two separate and unrelated proceedings. There is no nexus whatsoever between the two proceedings.

[17] The House of Lords in *Hilton v. Barker Booth & Eastwood (a firm)* [2005] UKHL 8 Times Law Report cited with approval the principle stated by the Court of Appeal in *Moody v. Cox and Hatt* [1917] 2 Ch 71, a decision which has often been cited and followed both in England and in the Commonwealth jurisdictions. The thrust of the judgment in *Moody v. Cox and Hatt* is that if a solicitor had put himself in a position of having two irreconcilable duties, it was his own fault.

[18] What are two irreconcilable duties depends very much on the facts and circumstances of each particular case. A solicitor who had conflicting duties to two clients is perhaps a good example. The fact that Shafee may not have a high regard for SP25 in the Suhakam Inquiry and that in this appeal he would be defending the witness's evidence does not in our view give rise to a situation where he can be said to be having two irreconcilable duties. Further, we do not see how his objectivity and independence would be compromised. That does not merit for his disqualification.

[19] In Shafee's submissions in reply, the following issues were raised:

(a) estoppel and *res judicata*;

(b) frivolous and vexatious application; and

(c) costs.

[20] On the issue of estoppel, we agree with Shafee's submissions that the applicant is barred from raising the issue of conflict of interest on the basis that the applicant had ample opportunity to raise this ground in the earlier motions to disqualify him, instead of raising them by way of instalments (see *Ahmadi Yahya v. PP* [2012] 7 CLJ 113; [2012] 6 MLJ 37; *Ramalingam Ravinthran v. Attorney General* [2012] 2 SLR 49).

[21] We note that the applicant had, on two earlier occasions, made applications to disqualify the respondent. The first application was *vide* encl. 27a and the second was filed *vide* encl. 48a. In the second application, this court had ruled that the doctrine of *res judicata* and issue estoppel applies, citing *Harun Abdullah v. PP* [2009] 4 CLJ 717; [2009] 3 MLJ 337, *Public Prosecutor v. Lee Siew Ngock* [1966] 1 LNS 143; [1966] 1 MLJ 225 and *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 SLR 239, among others.

[22] Both applications were dismissed by this court and on appeal to the Federal Court, the applicant met with the same fate.

[23] In *Ahmadi Yahya v. PP* [2012] 7 CLJ 113 His Lordship Azahar Mohamed JCA held:

> *Res judicata* is not confined to the issues which the court is actually asked to decide, but covers issue or facts which are clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them (see: *Chemfert Sdn Bhd & Anor v. Lim Hua* [2010] 7 CLJ 491). The applicability of the doctrine of *res judicata* in criminal matters is set out in *Superintendent of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256). The principle of *res judicata* is based on the necessity of giving finality to judicial decisions. It would not promote the due administration of the law or the promotion of justice for this court to have a power to re-hear an appeal afresh of which it has finally disposed. It is in the public interest that there should be finality in an appeal before this court . It is imperative to the due administration of our system of justice that once an appeal has been properly concluded, it is no longer before the court; if not there can be no end to litigation. It would otherwise open the floodgate to endless relitigation before the same court. The value and usefulness of a decision of this court becomes doubtful and uncertain if the appeal can be reopened at any time and the court is permitted to make a different order.

[24] The applicant in *Ramalingam Ravinthran v. Attorney General* [2012] 2 SLR 49 made an application to declare that the public prosecutor had breached his rights under art. 12(1) of the Constitution of the Republic of Singapore (similar to our art. 8 of the Federal Constitution). The allegation of breach of the applicant's constitutional rights were never raised during the trial or in the subsequent appeal but instead was raised in the new application. It was argued by the deputy public prosecutor that the applicant had the opportunity during his trial and appeal on his conviction to raise the constitutional issues, however as he did not raise those issues, he should not therefore be allowed to raise those issues and argue them in a subsequent related application. Chan Sek Keong, Chief Justice of Singapore (in delivering the judgment of the court) agreed with the submissions of the deputy public prosecutor, and opined that the applicant should not be allowed to raise those constitutional arguments. At p. 58 of the report His Lordship had observed as follows:

> [16] As mentioned in [2] above, this Motion is an attempt to re-open a conviction (in Ramalingam (HC) which has been unsuccessfully appealed against (in Ramalingam, (CA)). The substantive issue in this Motion (as set out at [9] above) concerns a constitutional point which the applicant could have raised during his trial in the High Court and also at the hearing of his appeal against the trial judge's decision. The applicant had two opportunities to raise that constitutional point, but did not avail himself of either of them. In the circumstances, the applicant could have had no cause to complain if we had declined to hear this Motion on the basis that he had exhausted all his rights to due process and had ceased to have any standing to challenge before a court of law the legality of his prosecution for the two capital offences set out at [6] above.

[25] As regard the issue of frivolous and vexatious litigation, we find there is force in the submissions by Shafee that this motion is made for the purposes of delaying the prosecution of the main appeal. It is therefore a vexatious application and an abuse of process.

[26] IH Jacob, the author of an article titled "The Inherent Jurisdiction of the Court" vol. 23 Current Legal Problem (1970) in explaining the term 'abuse of process' at p. 40 states that it:

> ... connotes that the process of the court must be used properly, honestly and in good faith, and must not be abused. It means that the court will not allow its function as the court of law to be misused, and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation.

[27] The House of Lords in *Hunter v. Chief Constable of West Midlands and another* [1981] 3 All ER 727 had explained that abuse of process can occur in a variety of ways, both subtle and evident. His Lordship Lord Diplock held:

> It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied: those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were

A to use this occasion to say anything that might be taken as limiting to fixed categories the kind of circumstances in which the court has a duty (I disavow the word 'discretion) to exercise this salutary power.

B **[28]** We are mindful that this appeal has wound its way so slowly through the maze of the corridors of this court at less than the proverbial snail's pace. As observed by Shafee, this appeal has made no progress since July 2013 and most of the postponements were at the instance of the applicant. It is not in the public interest for an appeal to be allowed to wallow in the court docket with no end in sight.

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[29] Our brother judge Abdul Malik Ishak, JCA has in a number of his judgments given an insight as to what an abuse of process and vexatious litigations are. Among them are such cases like *Sim Kooi Soon v. Malaysia Airlines System (No 2)* [2010] 9 CLJ 936; [2011] 4 MLJ 728 and *Dato' Seri Anwar Ibrahim v. PP* [2011] 7 CLJ 253; [2011] 5 MLJ 535. In the latter case, His Lordship had something to say on the delaying tactics employed by the applicant in the pursuit of his sodomy trial and it goes:

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> This case will fall in history. It will be chronicled as the only known case in our country or for that matter within the Commonwealth enclave where the appellant as an accused person persistently and consistently filed one application after another in an attempt to recuse the learned trial judge from hearing and continuing to hear the sodomy trial which is ongoing.

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At p. 562, paras. 90 and 91 of the report, in relation to the paragraph above His Lordship went on and deliberated as follows:

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> [90] Here, the delaying tactics engineered by the appellant should be a factor in refusing to grant the stay.
>
> [91] For these varied reasons, we dismissed the appellant's oral application to stay the sodomy trial proceedings pending the outcome of his proposed appeal to the Federal Court.

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[30] We are also reminded of a passage in *Attorney General v. Vernazza* [1960] 3 All ER 97 where Lord Denning had stated:

> No man, let alone a vexatious litigant, has a vested right to bring or continue proceedings which are an abuse of the process of the court.

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[31] We will stop short of declaring the applicant a vexatious litigant.

[32] We have a duty to ensure that the process of the court will not be abused. The applicant shall not be allowed to persistently misuse the court process. To do otherwise would be a travesty of justice.

[33] Having considered the factual matrix and the circumstances of this case, we are of the considered opinion that this motion has no merit and should be dismissed *in limine*. For the reasons stated above, we dismiss this application.

[34] With regard to the issue of costs, whilst we appreciate the sentiments expressed by Shafee on the delaying tactics employed by the applicant, however we exercise our discretion not to award any cost against the applicant or his counsel. This, however, should not be construed as this court condoning the conduct of the applicant or his counsel in not pursuing this appeal expeditiously.